# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1938.

No. 294.

CITY OF TEXARKANA, TEXAS.....*Petitioner*

v.

ARKANSAS LOUISIANA GAS COMPANY.....*Respondent*

On Writ of Certiorari to the United States Circuit Court of Appeals For Fifth Circuit.

## BRIEF FOR THE PETITIONER.

ED B. LEVEE, JR.,
BENJAMIN E. CARTER,
*Counsel for Petitioner.*

TEXARKANA, TEXAS,
NOVEMBER 5, 1938.

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## BRIEF FOR PETITIONER.

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*May It Please the Court:*

This case is before the court on writ of certiorari, granted on October 10, 1938, to the Circuit Court of Appeals for the Fifth Circuit.

### I.

### THE OPINIONS OF THE COURTS BELOW.

The trial court, the United States District Court for the Eastern District of Texas, filed no opinion. Its decree, R. 231-237. contains its findings.

The opinion of the United States Circuit Court of Appeals is reported in 97 Federal (2nd) 5. It appears in the record at R. 423.

## II.

## JURISDICTION.

A writ of certiorari has been granted herein to a final judgment and decree of the United States Circuit Court of Appeals for the Fifth Circuit. This decree was entered on June 3rd, 1938, (R. 433). A petition for rehearing was filed in that court on June 22, 1938, (R. 435), and was overruled on July 19, 1938. R. 445. The petition for a writ of certiorari and the transcript of the record were filed in this court on August 22, 1938.

Section 240 of the Judicial Code, as amended, Title 28 U. S. Code, Section 347, confers jurisdiction on this court to review on certiorari the final judgment of a Circuit Court of Appeals in any case, with the same power and authority, and with like effect, as if the cause had been brought here by unrestricted writ of error or appeal.

The nature of the case was set forth in the petition for writ of certiorari and is set forth below in the Statement of the Case. It is not believed that it is necessary to repeat it here.

## III.

## STATEMENT OF THE CASE.

*Note.* References to the record herein are to the

numbers of the printed pages of the transcript as certified to this court. This record is now being reprinted by the clerk of this court and the page numbers of this reprint are not available when this is written.

### *A. Preliminary Statement.*

The petitioner, the City of Texarkana, Texas, here seeks to enforce against the respondent, the Arkansas Louisiana Gas Company, a clause in the franchise contract between the parties, under which the company operates the gas distributing system in the city. The parties are hereafter referred to as the "city" and as the "gas company."

The clause of the contract here involved reads as follows, R. 18:

> "Section IX. If grantee shall be finally compelled to, or should voluntarily, place in any rates in the City of Texarkana, Arkansas, less than the rates granted by this Ordinance then and thereupon the lessened rate shall apply in the City of Texarkana, Texas, and grantee shall not be authorized or permitted to charge and collect any higher rate."

The District Court held this section to be valid and applied it to a part of the period covered by the suit.

The Circuit Court of Appeals held it to be invalid, and that, if valid, it was not applicable at all.

Texarkana, Texas, and Texarkana, Arkansas, form one physical and business community, although there are two municipal corporations divided by the state line along the middle of a main street. The gas company has one gas distributing plant which serves both cities.

For the entire period covered by this suit, from June, 1930, to date, the company has been compelled to extend to its consumers in Texarkana, Arkansas, services at rates less than the rates granted in the Texas franchise and collected by the co pany from Texas consumers. The city contends, for itself and for its consumers, that the above franchise section should be enforced by compelling the gas company to place such lesser rate in effect in Texas, and to refund to its Texas consumers the excess collected above the lesser rate.

The District Court for the Eastern District of Texas held the clause valid, but that it applied to a part only of the period covered by the suit. R. 231-237. No opinion was filed.

The Circuit Court of Appeals for the Fifth Circuit held (R. 423-432) the clause to be invalid, and that, if it were valid and enforcible, it is without applica-

tion in this suit. The second holding was not discussed or explained. (R. 431).

The holding that the clause is invalid was based on the court's interpretation of the clause to mean that the city was attempting to bind its City Council not to exercise its powers as a rate regulating tribunal,—an interpretation which the city contends is (1) forbidden by an applicable state statute, (2) in conflict with applicable state court decisions, and (3) a forced, unnatural and erroneous interpretation of plain words.

The city, in its petition for writ of certiorari, asked this court to review the holding of the District Court that the clause applied to a part only of the period covered by the case, and the holding of the Circuit Court of Appeals that it was invalid and was without application at all. The facts are not disputed. Nearly every reference in this brief is to a pleading of the gas company.

*3. Description of the Contract Sued Upon.*

The gas company operates in Texarkana, Texas, under a franchise contract with the city. It could not use the streets without the consent of the city. The giving of such consent is the grant of a privilege which the Texas courts have repeatedly held (cases cited in argument below) to be a valuable con-

sideration sufficient to bind promises, including promises as to rates, made by a utility in return therefor.

The name of the respondent has been changed during the pendency of the suit from Southern Cities Distributing Company to Arkansas Louisiana Gas Company. In 1928, it purchased from the Southwestern Gas & Electric Company (R. 123) the gas plant and franchise in Texarkana, Texas,—a franchise which was due to expire by its own terms in 1930 (R. 123). The franchise which the respondent so purchased contained the following clause (R. 67):

> "Article E: It is further understood between the said Southwestern Gas & Electric Company, its successors and assigns, and the City of Texarkana, Texas, that said Southwestern Gas & Electric Company shall not at any time charge for furnishing gas either to domestic or industrial consumers in the City of Texarkana, Texas, a greater sum or charge than it at the same time charges and collects from like consumers for similar service in the City of Texarkana, Arkansas."

Early in 1930, as the franchise was about to expire, the company applied for an increase in rates, which was refused by the City Council. This dis-

pute was settled by a compromise, and as a part thereof a new 25 year franchise contract was agreed upon. The new and increased rates were embodied in the franchise (R. 13), being therein described as rates "*determined and fixed by compromise agreement.*" This new franchise contained the agreement, (the Section IX copied in part "A" of this statement), designed to protect the city and its consumers against discrimination just as Article E of the expiring franchise had done.

This franchise, so conditioned, was granted by an ordinance passed by the City on June 13, 1930 (R. 18), and which provided that it become effective upon the gas company "filing a written acceptance of the terms" thereof. The gas company did file, on June 18, 1930, its written acceptance of the ordinance "with its terms and provisions." (R. 19).

This franchise has not been amended, repealed or modified (R. 127).

*C. Facts as to Violation of the Contract.*

Only domestic and commercial rates are involved in this controversy.

*Texas Rates.*

Since June 13, 1930, the gas company has charged and collected in Texarkana, Texas, the increased

rates which were placed in effect by the compromise agreement, of which Section IX was a part. It so states on page 3 of the brief it filed in opposition to the petition for writ of certiorari herein. These rates are shown on R. 13 and 14, and, for domestic and commercial consumers, have been, and now are:

For the first 1,000 cubic feet per month per consumer, $1.00. This is also the minimum charge.

For the next 149,000 cubic feet per month per consumer, at the rate of $0.50 per thousand cubic feet with a discount for prompt payment of 5%,—a net charge of 47½c per MCF.

For all over 150,000 cubic feet per month per consumer at the rate of 25c per MCF, with a discount of 2c per MCF for prompt payment,—a net rate of 23c per MCF.

For convenience, this rate schedule is hereinafter referred to as the $1.00 rate.

*Arkansas Rates.*

*(1) Summary of Facts.*

The facts as to the Arkansas rates for this entire period are detailed below. Briefly stated, the fact is that for this entire period, the company has been finally compelled to supply gas in Texarkana, Arkan-

sas, at the following rates for domestic and commercial consumers (R. 73):

For the first 100,000 cubic feet at the rate of 50c per thousand, with a ten per cent discount for prompt payment. The minimum charge is 50c per month. This is a net rate of 45c per MCF.

For all over 100,000 cubic feet per month at the rate of 22c per MCF with a discount of 10% for prompt payment,—a net rate of 19.8c per MCF.

For convenience, this rate schedule is hereinafter referred to as the 45c rate.

In an answer filed on July 14, 1937 (R. 225) the gas company stated (R. 148) that its estimate of the amount collected in Texas up to that time in excess of the amount due if the Arkansas rates were applicable was that the excess was probably more than $150,000.00.

*(2) Details as to Facts on Arkansas Rates.*

Prior to the new franchise of 1930, the rates in Arkansas and Texas were the same, being the rates set forth above as the Arkansas rates. For Texas, they are set forth at R. 65 to 67. For Arkansas, they are set forth at R. 222 to 224. The company has pointed out one difference in that the Arkansas rate, at R. 224, contains a $1.00 charge for turning

gas on after a customer has been cut off for nonpayment of bills or where his meter has to be moved more than once in 12 months, which charge did not exist in Texas.

An attempt to increase the Arkansas rate, to the same rate as that obtained in Texas on June 13, 1930, was made at the same time. A similar compromise agreement was made with the Arkansas City Council. This Arkansas agreement was, however, subject to the referendum, and referendum petitions were filed against it. The Arkansas constitution provides that all measures referred to the people shall remain in abeyance until the election be held. The increased rates were, nevertheless, put into immediate effect in Arkansas and the council refused to call a referendum election. A mandamus action was filed to compel it to do so. The gas company intervened in this suit and carried it to the Supreme Court of Arkansas, where a judgment ordering the election was affirmed, *(Southern Cities Distributing Co. v. Carter*, 184 Ark. 4), and then to this court, where the company's appeal was dismissed and certiorari denied on March 14, 1932. See same case in 285 U. S. 525. The referendum election was then held in May, 1932, resulting in the rejection of the compromise agreement as to rates. On the day of the election, the gas company filed suit in the Uni-

ted States District Court in Arkansas to prevent the election from having any effect and to protect the company in its past action in charging the higher rate and in its proposed future action of continuing to charge it in spite of the election. It obtained a temporary injunction and continued to charge the increased rate thereunder. The Arkansas city appealed from a refusal to dissolve the injunction and the Circuit Court of Appeals for the Eighth Circuit reversed the case and dismissed the bill. See *Texarkana v. Southern Cities Distributing Company*, 64 Fed. (2nd) 944. This court, in that case, denied certiorari on October 9, 1933, and denied a rehearing thereon on November 13, 1933. See same case, under reverse title in 290 U. S. 650.

In this last case, the District Court in Arkansas entered its final decree on December 1, 1933. This appears at R. 68, and following. This decree (R. 72) compelled the company to restore the old rate of 45c net for domestic and commercial consumers in Arkansas, and, further, to make refunds to all the Arkansas consumers down to the basis of this rate for all amounts collected under the compromise increased rates of 1930 over the amount that would have been due under the old and lesser rate of 45c net per MCf which was in effect when the compromise agreement was made. Such refunds were made,

in the amount of about $66,000, and the lesser rate was placed in effect as of December 1, 1933.

For this first period then, from June, 1930, to December 1, 1933, the company was compelled to place a rate of 45c net in effect in Arkansas while it collected the higher compromise rate of 1930 in Texas. The city, in the suit now at bar, sought refunds for the Texas consumers for this period. The District Court in this case held the contract was not applicable to this period and dismissed the bill as to it (R. 234). The city assigned this as error (R. 414) on its appeal to the Circuit Court of Appeals, and asks this court to review it.

For the period from December 1, 1933, to February 16, 1934, the company collected the lesser rate of 45c net in Arkansas. It continued to collect the $1.00 rate in Texas. The District Court held the non-discrimination clause of the franchise to be valid and to be applicable to this period. The company appealed from this, and the Circuit Court of Appeals held the clause to be invalid, and without application if it were valid.

On October 23, 1933, R. 365, after this court denied certiorari in the injunction case from the Federal Court in Arkansas, and while a petition for a rehearing thereon was pending here, the company filed

with the Arkansas City Council an application for rates much higher than the old 45c net rate, and much higher than the compromise rate of 1930. Full hearings were held and on December 22, 1933, the application was denied, and the company was ordered to continue the 45c rate. On February 9, 1934, R. 365, the company gave notice of an application for a temporary injunction to protect it in charging the increased rates. Suit was filed in the Federal Court in Arkansas on February 16, 1934, and a temporary restraising order then obtained which protected the company until Dec. 4, 1936, in collecting in Arkansas a much higher rate than the $1.00 rate it was then charging in Texas. This suit resulted in a decree in the District Court in Arkansas on December 4, 1936 (R. 188), dissolving the injunction, restoring again the old 45c net rate, and ordering refunds down to such rate for the period from Feb. 16. 1934, to December 4, 1936. This judgment for refunds was superseded pending the appeal. A temporary injunction pending the appeal was denied (R. 119) and the rate charged and collected in Arkansas since Dec. 4, 1936, has been 45c net per MCF,—much lower than the Texas rate. The Circuit Court of Appeals for the Eighth Circuit affirmed the decree of December 4, 1936. See *Arkansas Louisiana Gas Company v. City of Texarkana,*

*Ark.*, 96 Fed. (2nd) 179, and this court denied certiorari therein on October 10, 1938.

Thus for the entire period from February 16, 1934, to date, the company has been compelled to serve at a lower rate in Arkansas than in Texas. For the first part of this period, from February 16, 1934, to December 4, 1936, a higher rate was collected, under the temporary injunction, in Arkansas than in Texas, but there is a final judgment for refunds for this period down to the basis of the 45c net rate. Since December 4, 1936, the lower rate has been actually collected in Arkansas.

For the entire period since Feb. 16, 1934, the District Court in this, Texas, case dismissed the bill without prejudice to a new suit for refunds when the last Arkansas case should be disposed of. In view of the fact that the gas company (R. 149) has already pleaded the two year, four year and five year statutes of limitation, the City contends that its bill should not have been dismissed. It assigned as error (R. 414), the action of the District Court in refusing to order a present reduction in rates and in dismissing the bill for the period since Feb. 16, 1934.

*Summary as to Rates in the Two Cities.*

*Texas.*

From June, 1930, to the present time, the gas company has charged and collected, and is now collecting, from domestic and commercial consumers in Texas a rate of $1.00 per MCF for the first MCF per month, with a net rate of 47½c per MCF for all gas consumed above that up to 149 MCF per month, and of 23c per MCF for all consumption above 150 MCF per month.

*Arkansas.*

For this entire period the gas company has been finally compelled to place in effect in Arkansas a much lower rate, one of 45c net for all consumption up to 100 MCF per month and of 19.8c net for all consumption in excess of 100 MCF per month.

This is true for the period from June, 1930, to Dec. 1, 1933, because a final decree of the United States District Court compelled refunds down to this basis.

For the period from Dec. 1, 1933, to Feb. 16, 1934, this lower rate was collected under said final decree.

For the period from Feb. 16, 1934, to Dec. 4, 1936,

another decree of the same court, now final, has ordered refunds down to the same lower rate basis.

For the period from Dec. 4, 1936, down to the present time, the same lower rate has been, and is now being, charged and collected in Arkansas.

*D. Other Proceedings in Texas.*

As has been pointed out, the gas company on Oct. 23, 1933, while the first Arkansas injunction case was pending in this court on petition for a rehearing, applied to the Arkansas city council for a large increase in rates. On November 3, 1933, R. 128, it applied to the Texas city council for a similar increased rate. The city council of Texarkana, Texas, is authorized by the City Charter to regulate rates. R. 166. An appeal to the Railroad Commission of the state is provided by Article 6058 of the Revised Statutes, Appendix II. The City Council, on November 14, 1933, R. 173, passed a resolution, which first recited contract rights of the city under the franchise, and then recited that it would hear the application, without thereby waiving the contract rights, for the purpose of determining whether the franchise provisions should be waived.

On Jan. 22 and 23, 1934, (R. 363) a full hearing was held. The detailed findings appear on R. 285 to 322. The order recited that the hearing was held

to enable the council to determine whether the contract was oppressive or unjust and whether it should be waived. The council found that the rate then in effect in Arkansas, and which the contract bound the company to apply in Texas, of 45c net per MCF, was sufficient to pay all expenses, depreciation and a fair return. The Arkansas City Council's finding to the same effect has been upheld by the U. S. District Court in Arkansas, and by the Circuit Court of Appeals for the 8th Circuit, and this court has denied certiorari. The Texas Council refused the increase applied for and refused to waive the contract and ordered the city attorney to continue his efforts in the courts to force the company to carry out the contract by putting the Arkansas rate in effect and by making refunds in Texas similar to those then being made in Arkansas for the period from June, 1930, to December 1, 1933.

As was pointed out, the Federal Court in Arkansas on December 1, 1933, entered its final decree in the first Arkansas case ordering the old or lower (45c net) rate put in effect and ordering refunds down to the basis of that rate for the period since June, 1930. On December 12, 1933, R. 176 and 177, the City Council in Texas adopted a resolution reciting this decree and calling on the company to comply with its franchise and put the lower Arkansas

rate in effect until such time as it might lawfully be changed, and that it make refunds to its consumers in Texas similar to those ordered by the court for the consumers in Arkansas.

The company alleges, R. 366, that on March 3, 1934, it appealed to the Texas Railroad Commission praying it to set aside the resolution of Dec. 12, 1933, and to approve the increased rates it had applied for, but that the Commission (R. 367), as a condition of said appeal, had required it to file a $10,000 bond, "which the company refuses to file." (R. 376). There the matter stopped. The commission, by pleading filed June 13, 1934, R. 326, stated that it stood ready to hear the appeal if the bond be filed within a reasonable time. The statute, Article 6058 of the Revised Statutes, authorizing such an appeal to the Commission "by filing with it, on such terms and conditions as the Commission may direct, a petition and bond," is printed in Appendix II to this brief.

*E. Further Abstract of the Pleadings.*

Two separate cases appear in the record. They were consolidated for all purposes. Amended and supplemental pleadings were filed in both. It is not believed to be necessary to abstract them in detail.

The bills of the city alleged the facts which have been hereinbefore stated. The record references are

almost entirely to statements in the pleadings of the gas company. The city also alleged (R. 272) that it was suing both on its own behalf and as representative of all the consumers, of whom there are more than 3500, and all of whose claims are based on the same franchise contract and the same facts.

The last pleading of the City was filed December 30, 1936, (R. 121), after the decree of the Federal District Court in Arkansas was entered in the last Arkansas case (the one in which this court denied certiorari on October 10, 1938), and it brought the facts and the prayer for relief down to date as of that time.

The prayer was (R. 111):

1. That the company be ordered to place in effect as of December 4, 1936, the lower rate it was then collecting in Arkansas.

2. That the company make refunds to the Texas consumers down to the basis of the lower Arkansas rate for the period from June, 1930, to Feb. 16, 1934.

3. That for the period from Feb. 16, 1934, to Dec. 4, 1936, for which the Arkansas consumers had a judgment, then superseded pending appeal, for refunds, the rights of the Texas consumers to similar refunds, in the event the Arkansas decree be af-

firmed, be protected by impounding the same in the registry of the court.

The last answer of the company occupies 113 pages of the record. R. 122 to 225. It pleaded the facts as hereinbefore set out, alleged that the non-discrimination clause (Section IX) of the franchise was invalid, and further alleged facts which, if true, would show that any rate less than the rate applied for by it on Nov. 3, 1933, would confiscate its property. The rate applied for is the same rate as the one at issue in the last Arkansas case in which certiorari has recently been denied. It asked that Section IX be declared void and inapplicable and be cancelled, and that the rates filed by it with the Council be declared lawful rates.

The City moved to strike this answer on the ground that it stated no facts constituting a defense. (R. 228). The court sustained this motion and, the defendant refusing to plead further, a decree was entered on July 31, 1937 (R. 231 to 237).

*F. Decree of District Court.*

The District Court filed no written opinion. In its decree (R. 231) it held:

1. That Section IX of the franchise is valid and

binding. The company appealed from this holding. R. 242.

2. That it was not applicable to the period from June 13, 1930, to December 1, 1933. The bill in so far as it asks refunds to the Texas consumers for this period was dismissed. The city appealed from this holding. R. 414.

3. That the consumers have refunds from the gas company for the period from Dec. 1, 1933, to Feb. 16, 1934, for the difference between the Texas rate and the lower rate in effect in Arkansas for that period. The company appealed from this. R. 242.

4. That, although from Dec. 4, 1936, a lower rate was actually collected in Arkansas, the company should not be forced to use the same rate in Texas because an appeal was pending from the decree refusing to protect the company in increasing its rates in Arkansas, and that the bill should be dismissed without prejudice to a later suit in so far as it sought to enforce the use of the lower rate in Texas and sought refunds for the period after Dec. 4, 1936, when the higher rate was in use in Texas. The city appealed from this holding. R. 414.

5. That the bill be dismissed without prejudice to a later suit after the final disposition of the Arkansas case in so far as it sought refunds for the

Texas consumers for the period from Feb. 16, 1934, to Dec. 4, 1936. The city appealed from this holding. R. 414.

*G. The Decree and Opinion in the Circuit Court of Appeals.*

The Circuit Court of Appeals reversed the decree and remanded the cause with directions to dismiss the bill. R. 433.

In its opinion, R. 423, it held that the disputed Section IX of the franchise was completely invalid and that if it were valid it was inapplicable to the facts of this suit. No discussion was had of the second holding. The first holding was based on the argument, which the city believes to be erroneous in fact and in conflict with the statute and the local decisions, that the promise of the gas company not to charge more in Texas than in Arkansas was an attempt to bind the hands of the city council not to exercise the rate regulating powers conferred on it by law, and hence was void.

## IV.

## SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in finding and holding that Section IX of the franchise contract is invalid.

2. The Circuit Court of Appeals erred in finding and holding that Section IX of the franchise, if valid, is without application to the facts of this case.

3. The Circuit Court of Appeals erred in reversing the decree of the District Court which applied Section IX of the franchise to the period from December 1, 1933, to February 16, 1934, and which ordered refunds for that period.

4. The District Court and the Circuit Court of Appeals erred in finding and holding that Section IX of the franchise is not applicable to the period from June 13, 1930, to December 1, 1933, and in refusing to adjudge refunds for that period. Assigned as Error on R. 414 and 415.

5. The District Court and the Circuit Court of Appeals erred in refusing to order the gas company to place in effect in Texas the lesser rate which has been in effect in Arkansas since Dec. 4, 1936, and in refusing to adjudge refunds down to the basis of such lower rate for the period since Dec. 4, 1936. Assigned as Error on R. 415.

6. The District Court and the Circuit Court of Appeals erred in dismissing the bill in so far as it sought to have excess collections for the period from February 16, 1934, to December 4, 1936, impounded

in the registry of the court. Assigned as Error on R. 414.

*Note:* In its petition for writ of certiorari, the city stated four "Reasons relied on for the Allowance of the Writ." These are not here repeated as "Specifications of Error" for the reason that they are all argued below.

The first three "Reasons" were reasons for urging this court to review the decision of the Circuit Court of Appeals that Section IX of the franchise was invalid, and are argued below under Point "A." wherein the City contends that Section IX is valid. These reasons were that the interpretation placed by that court on Section IX and its decision that same was invalid is in violation of the city charter, is a strained, unnatural and erroneous construction of plain words, is in conflict with applicable local decisions, and is untenable and in conflict with the weight of authority.

The fourth "Reason" was a plea to the court, to review the decision of the lower courts as to whether Section IX, if valid, applies to the facts of this case, on the ground that the importance of the questions involved justify the court in reviewing the decisions on this question. The way in which the City contends

Section IX should be applied is argued below under Point "B."

## V.

## ARGUMENT.

*Summary of the Argument.*

### POINT A.

### THE CIRCUIT COURT OF APPEALS ERRED IN FINDING AND HOLDING THAT SECTION IX OF THE FRANCHISE CONTRACT IS INVALID.

1. This holding is based on the interpretation, by that court, of Section IX as an attempt on the part of the City to bind the City Council not to exercise its rate regulating powers.

2. The Court's interpretation of Section IX is erroneous, because:

   (a) It is in conflict with the plain mandate of the City Charter, which is a state statute.

   (b) It is in conflict with the applicable decisions of the state courts.

   (c) It is an unnatural, strained and erroneous construction of plain words.

3. **Section IX of the franchise is a valid contract under the state law.**

   (a) **A utility has no right to use the streets of the city without the consent of the city.**

   (b) **The grant of this privilege is a valuable consideration sufficient to bind promises of the utility, including promises as to rates.**

   (c) **The gas company is estopped to question the validity of its promise given to obtain a privilege which it is still using.**

   (d) **The fact that the city council has the power to regulate rates is not an inhibition to contracts on the part of the utility as to rates.**

4. **The fact that Section IX calls for a change in rates without a new ordinance placing the new rates in effect does not render the contract void.**

## POINT B.

## SECTION IX OF THE FRANCHISE IS APPLICABLE TO THE ENTIRE PERIOD COVERED BY THIS SUIT.

1. It applies to the period from December 1, 1933, to February 16, 1934, and the Circuit Court of Appeals erred in holding otherwise.

2. It applies to the period from December 4, 1936, to the present time. The Circuit Court of Appeals erred in holding otherwise, and the District Court erred in refusing to apply it to this period at the present time.

3. Section IX applies to the period from June 13, 1930, to December 1, 1933, and the District Court and the Circuit Court of Appeals erred in holding otherwise.

4. The District Court erred in dismissing, without prejudice, that part of the bill seeking refunds for the period from Feb. 16, 1934, to Dec. 4, 1936; and the Circuit Court of Appeals erred in holding that Section IX was not applicable to this period.

## POINT A.

## THE CIRCUIT COURT OF APPEALS ERRED IN FINDING AND HOLDING THAT SECTION IX OF THE FRANCHISE CONTRACT IS INVALID.

1. *This holding is based on the interpretation, by that court, of Section IX as an attempt on the*

*part of the city to bind the City Council not to exercise its rate regulating powers.*

That court's argument as to the validity of Section IX begins at the middle of page 431 of the printed transcript, as certified by the clerk of the lower court.

Section IX reads as follows (R. 18):

> "If grantee shall be finally compelled to, or should voluntarily, place in any rates in the City of Texarkana, Arkansas, less than the rates granted by this ordinance then and thereupon the lessened rate shall apply in the City of Texarkana, Texas, and Grantee shall not be authorized or permitted to charge and collect any higher rate."

The reason given by the Circuit Court of Appeals for holding this section of the contract to be void is its interpretation of the section as an attempt to bind the City Council not to exercise its rate regulating function. It said it is "an attempt to mutually bind appellant and the City of Texarkana to any lessened rates which may in the future be fixed within the Arkansas city." The court also said: "It is one purporting to bind the City and the Utility alike to abide by the future action of the Utility and the City of Arkansas." And again the court said: "A more

definite binding of the hands of the City Council, a more complete abdication of its ratemaking function, a more complete delegation of it could hardly be imagined."

We do not here quote all the court said, but as we read the opinion it gave no reason for holding the contract void other than the theory that it was an attempt to bind the City Council not to exercise its rate regulating powers. If the section cannot bear this interpretation, then the court's reason for holding the contract invalid must fall.

2. *The court's interpretation of Section IX is erroneous, because:*

   (a) *It is in conflict with the plain mandate of the City Charter, which is a state statute.*

No court can hold that a franchise granted by a city means one thing when the state statute under which the city is organized says it must mean the opposite.

This city was incorporated under a special act of the legislature passed in 1907 (R. 123). This city charter provides:

In Section 163 (R. 165 and in Appendix I hereto), that every franchise "must expressly set forth that

the council shall have the right and privilege of regulating and controlling the operation of all business done thereunder, fixing fares, rates, tolls and charges * * *."

In Section 163a (R. 165 and in Appendix I hereto), that in the event any franchise fails to contain such stipulations, "then it shall, nevertheless, be considered that all of the said stipulations contained in said Sections * * 163 * * are part and parcel of the said contract and franchise, just as though written therein, and the said applicant so accepting such franchise, as well as their heirs, assigns and successors, shall be held and firmly bound thereto notwithstanding such omissions."

Section 196 (R. 166 and in Appendix I), provides that the city council "shall have the power to regulate by ordinance the rates and compensation to be charged by all water, gas, * * * companies." etc.

Under this statute, Section IX must be interpreted as though there were written therein, and as part and parcel thereof, the following clause, or one of similar import:

> "* * * provided the city council shall have the right and privilege of regulating and controlling and fixing rates, tolls and charges as authorized by the City Charter."

Such a clause must be considered to be a part of Section IX if the statute be obeyed. With such a clause in it, Section IX cannot be construed as an attempt to promise that the City Council will not exercise its rate regulating powers. It is not, in words, a promise to anyone that the City Council will not raise or lower the rate above or below either the franchise rate or the Arkansas rate as such Council, as a rate regulating tribunal, might find necessary or proper; nor can it, under the statute, be construed to bind the hands of the City Council in any way.

(b) *The court's interpretation of Section IX is in conflict with the applicable decisions of the state courts.*

A similar question was discussed by the Supreme Court of Texas in the case of *Dallas Street Railway Co. v. Geller*, 114 Tex. 484, 271 S. W. 1106 (1925), reported below in 245 S. W. 254 (Court of Sivil Appeals at Dallas). The opinion in the Supreme Court is by that court itself,—not by one of its Commissions of Appeals. The reports do not show exactly how the issues got before the court, and for that reason the city has consulted the briefs in the case.

In 1917, the City of Dallas, Texas, granted a franchise to the street railway, which was accepted by

it, which franchise designated five cents as the fare to be charged. That city operates under a charter which invested in the board of commissioners the power to regulate rates. In 1922, the railway asked for an increase in rates and the commissioners granted an increase for a period of one year. The briefs show that the commissioners, in granting the increase, saved what the commissioners believed to be the contract right of the city to a fare of five cents, and provided that the increase was temporary, to meet an emergency, and that at the end of the year the company should return to the five cent fare. This fact is not shown in the reported opinions.

Thereafter one Geller, a citizen of Dallas, brought suit against the railway company to enjoin the increase. The city was not made a party. He claimed that the franchise was a contract and that the company was violating the contract in charging more than five cents because the action of the commissioners in granting an increase was subject to the referendum and such action had been taken in such a way as to prevent a referendum. The ctiy seems not to have been in the case until after the Court of Civil Appeals acted upon it.

The trial court simply dismissed Geller's suit, and he appealed to the Court of Civil Appeals. That

Court held that the franchise was not a contract. This was not an interpretation of the words used, but was based on the argument that a city whose council had the power to regulate rates could not bind a utility as to rates by a contract. That court, however, held further, that the grant of the increase was subject to the referendum and that one should be held.

The street railway appealed to the State Supreme Court. It expressed itself as satisfied with the holding that it could not be bound by an agreement as to rates, but it sought reversal of the holding as to the referendum.

At this stage the City Attorney of Dallas filed a brief as *amicus curiae* seeking to protect the contract right of the city to the five cent fare. He was joined by the city attorneys of a number of other Texas cities. They all asked the Supreme Court to reverse the holding that a city endowed with the power to regulate rates could not make a contract as to rates which would bind a utility even though the city did not try to bind its council not to exercise the rate making power given it by statute.

While the case was pending, one of the Commissions of Appeals of the Supreme Court decided the case of *Uvalde v. Uvalde Elec. & Ice. Co.*, 250 S. W.

140. In that case the city had obtained a promise as to rates from the utility by giving in return therefor its express promise that such rates would be maintained for a number of years. This seems to have been the sole consideration. The city council had the power to regulate rates, and the Commission of Appeals held the contract void. It also argued that a utility could not be bound by such a contract with a city whose council had such powers, even though the city did not attempt to bind its city council,—in other words that such a city could not buy such a promise from a utility for any consideration.

At that time the Supreme Court of Texas had the custom, in many cases, of adopting the recommendation of its commissions of appeals as to the judgment to be entered without approving the reasoning by which the commission reached its conclusion. The opinion was not regarded as a precedent unless expressly approved by the Supreme Court, and the questions discussed were regarded as open questions. This custom was abandoned in 1935. See *National Bank of Commerce v. Williams*, 125 Tex. 619, 84 S. W. (2nd) 691. In the Uvalde case, the Supreme Court did not approve the opinion but adopted the judgment recommended by its commission.

As stated, the opinion of the Commission of Ap-

peals in the Uvalde case came out while the Geller case was pending in the Supreme Court, and briefs were filed arguing the effect of that case.

Such was the situation before the Supreme Court of Texas when it wrote its opinion in the Geller case. The utility had promised a certain maximum fare. The city had made no counter promise as to rates. The Court of Civil Appeals had argued that such a contract could not bind the utility, and this point had been briefed by various city attorneys as *amici curiae* and the court had been confronted, in the briefs, with the unapproved opinion of its Commission of Appeals in the Uvalde case. In these circumstances, the Supreme Court of Texas said, 114 Tex. 484, 271 S. W. 1106:

> "Perhaps the city attorneys, *amicus curiae*, are unduly or unnecessarily alarmed, construing, as they do, the opinion of the honorable Court of Civil Appeals to hold that a municipality cannot make contracts that are binding upon public service corporations."

The Supreme Court then discussed various cases cited by the lower court to the effect that the legislative power to regulate rates was limited by the due process clause. The court then said (271 S. W. 1107):

> "The right or power to further control or regulate the grant (of a franchise) in regard to the rate schedule is a reservation to the municipality and not an inhibition to contract; and, where a franchise is accepted by a grantee, this reservation provided in the law becomes a part of the contract."

The Supreme Court went on to hold that the grant of the increase in Dallas was an exercise of the regulatory powers granted by the charter and that the lower court was in further error in holding it was subject to a referendum, and reversed the judgment.

Petitioner contends that this opinion of the Supreme Court of Texas shows the law in Texas to be that the existence of the powers of the city council to regulate rates is "not an inhibition to contract," but is a "reservation to the municipality," and becomes a part of the contract. The Circuit Court of Appeals has, in this case, held that a municipality cannot make contracts as to rates that are binding upon public service corporations, and has refused to hold that this reservation provided by the law is a part of the contract, and in so doing it has decided an important question of local law in a way in conflict with the applicable local decisions and in conflict with the way the state courts would have de-

cided this present case. The Circuit Court of Appeals has refused, in the face of the charter and of this decision, to treat the existence of the regulatory power as a reservation in the contract, and has treated such power as an inhibition to contract when the Supreme Court of Texas has said it is not. The question whether a Texas city can make a contract as to rates which will bind a utility is certainly an important question of local law. It is squarely presented in this case. The Supreme Court of Texas has stated its opinion to be the opposite of the conclusion reached by the Circuit Court of Appeals in this case.

(c) *The court's construction is an unnatural, strained and erroneous construction of plain words.*

On R. 152, the company itself pleaded "The City may not under any circumstances bind itself by contract as to rates."

The company argued that the clause was void as a matter of contract law on the theory that the only consideration which could bind the promise of a utility as to rates is a counter-promise on the same subject matter by the city; and that the city could not and had not attempted to make any promise as to rates.

Section IX says nothing about what the City Council will or will not do in the event rates are lowered in Arkansas. It does *not* say that the Council will not or may not investigate the rates or raise or lower them above or below the Arkansas figure. Where there is no promise as to what the Council will or will not do, the correct rule of interpretation is that stated in *Knoxville v. Knoxville Water Co.*, 189 U S. 434 at 437, where this court had before it a case where a utility had made a promise as to rates to a city endowed with the power to regulate rates, and there was no express promise by the city as to rates. This court said:

> "* * * it seems to us impossible to suppose that any power to contract which the city may have had was intended to be exercised in such a way as to displace the municipal power expressly reserved or given by the general law."

The actions of the gas company show that it did not regard Section IX as an attempt to bind the hands of the City Council. On November 3rd, 1933 (R. 26), it filed with the City Council an application for increased rates (R. 19). This was before any action with reference to lower rates had been taken by the city, but after court action had made certain the Arkansas rate would be lowered. And

the City Council did not regard itself as bound not to exercise its regulatory powers. It heard the application in order to determine whether the contract rights of the city were oppressive or unfair and whether it, as a rate tribunal, should grant relief from them. Its finding, after what the company describes as a full hearing, was that the contract rate (45c net) was more than sufficient to pay expenses, depreciation and a fair return, and that no relief from the contract should be given. This finding has not been set aside.

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As a matter of the meaning of plain words, and as a matter of compliance with the city charter, and in accord with the decision of the Supreme Court of Texas, it must be held that Section IX is not an attempt to bind the City Council not to exercise its rate regulating powers, and that the Circuit Court of Appeals erred in so interpreting the Section. This was the reason assigned by that court for holding the Section to be invalid.

3. *Section IX of the franchise is a valid contract under the state law.*

   (a) *A utility has no right to use the streets of the city without the consent of the city.*

**No citation of authority is necessary, although this proposition is supported by all the cases cited in the next sub-section of this argument.**

**Section 160 of the City Charter, reprinted in Appendix I of this brief and pleaded by the company on R. 164, provides that the rights of the city in the use of the streets shall be inalienable to any person, firm or corporation except by license permit or franchise granted by the city in the manner laid down in the charter.**

(b) *The grant of this privilege is a valuable consideration sufficient to bind promises of the utility, including promises as to rates.*

The following cases support the above proposition. The question as to whether the existence in the City Council of the rate regulating power forbids such a contract is discussed in sub-section A-3-d of this argument.

In *Texarkana Gas & Electric Co. v. City of Texarkana*, 123 S. W. 213 (C. C. A., Texarkana), an electric light franchise had been granted, to the predecessor in title to the gas franchise of the present gas company This franchise required the grantee to furnish free lights for the city hall and jail and

to furnish street lights at specified prices. Later the city tried to levy a pole tax. The court held that it could not do so. The franchise had been granted in consideration of certain promises. The company was bound to carry out those promises. The city could not exact any additional consideration. The court said:

> "In granting the right or franchise as it is called, the City can impose conditions or charge a fee for the privilege given, which the applicant can accept or reject at his pleasure; but, having accepted it, *he takes the franchise subject to the conditions imposed and must pay the consideration exacted.*"

The same rule was followed in *City of Terrell v. Terrell Electric Co.*, 187 S. W. 966 (C. C. A. Dallas, 1916). There the court said:

> "* * * if the municipality annexes to a grant to enter upon its streets a condition, although without authority to do so, and the grantee voluntarily accepts the grant with the annexed condition, it cannot afterwards refuse to be bound thereby or be heard to deny the authority to impose the same. *Athens Telephone Co. v. City of Athens*, 182 S. W. 42. The rule stated was adhered to in the case cited and was a controlling

issue. Writ of error was denied by the Supreme Court."

In *Athens Telephone Co. v. City of Athens*, 163 S. W. 371, 182 S. W. 42 (C. C. A. Dallas, 1914), the grantee had promised, in consideration of the grant of the franchise, not to charge over $1.50 per month for telephones. It announced an increase in rates. The city brought suit to enjoin a rate in excess of $1.50 per month. The trial court granted the writ. This was twice affirmed by the Court of Civil Appeals at Dallas, once on refusal to vacate a temporary injunction and again in affirming the final decree.

The same result was reached in the following cases:

*Greenville Telephone Co. v. Greenville*, 221 S. W. 995 (C. C. A. Dallas, 1920)

*Texas Telephone Co. v. City of Mart*, 226 S. W. 497 (C. C. A. Austin, 1920).

In the last case the court pointed out that the utility had no right to use the streets without the consent of the city, and whether the permit be construed as a contract or as merely a license, the licensee must comply with the terms of the franchise as long as it avails itself of the benefits thereof.

The same result was reached in the later case of *Fink v. City of Clarendon*, 282 S. W. 912 (C. C. A. Amarillo, 1926).

In the case of *Cleburne Water, Ice and Lighting Company v. City of Cleburne*, 35 S. W. 733 (1896), a case in which a writ of error was denied by the Supreme Court of Texas, one Moss had obtained a franchise to supply water in the City of Cleburne. Moss' original proposition was that he would charge consumers of water "the same rates as are now charged at Waco, Texas, by said Bell Water System, the rates being the present adopted rates of said system." Certain persons objected to this original proposition. Thereupon Moss submitted a second proposition which was accepted by the Council. In this proposition he called attention to the fact that certain objections had been raised to his original proposition, and he then proposed to "charge consumers of water the same rates as are now charged at Waco, Texas, by the Bell System of waterworks, or such other reasonable rates as from time to time shall be fixed by the Council of the City of Cleburne; it being expressly understood that the limits of water rates shall not be less than is allowed by cities of like size and population in this State."

Moss' successor in title proposed to raise the rate

to a higher one than the rates in Waco, Texas, and the City brought a suit to enjoin him from charging such higher rates. The Court of Civil Appeals said:

> "We are of opinion that the contract fixes the Bell rates as a basis, and that the company is bound to furnish water at that rate until the City Council should fix other reasonable rates; and, in the event the City Council saw proper to change the rate, it could not fix a rate less than 'is allowed by cities of like size and population as Cleburne in this State.' From the facts and circumstances it is evident that the contracting parties intended the Bell rates to prevail unless other cities, of the character named, fixed the water rate less than the Bell rates, in which case the city council of Cleburne would have the power to change the rates, provided a less rate was not fixed than allowed by such cities. It was not intended that the city council should fix rates higher than the Bell system. * * * The appellant being bound to supply water at the Bell rates it is unnecessary for us to consider whether the rates attempted to be charged by it are reasonable or unreasonable. If appellant entered into a bad contract it must abide thereby; for in such a case the courts will afford no redress."

As before pointed out, the Supreme Court of Texas denied a writ of error in this case. This case was decided in 1896. The City of Texarkana, Texas, operates under a charter, enacted by the legislature in 1907, which authorizes it to make contracts with utilities, in which contracts *the right and privilege* to regulate rates must be reserved. In 1928, the defendant bought the gas distributing system in Texarkana, Texas, which was then operating under a franchise which provided that the gas company would not charge in Texas higher rtaes than it was permitted to charge in Arkansas. In 1930, the franchise having expired, or being about to expire, this defendant made a new franchise contract with the City of Texarkana, Texas, which contract provided that if the company should be compelled to give the City of Texarkana, Arkansas, lesser rates than those then granted in the Texas franchise, then it should give the City of Texarkana, Texas, the benefit of such lower rates. There is no essential difference between this case and the Cleburne case above cited. In the Cleburne case the contract was that no higher rates than the Bell rates should be charged, but that the City Council should have the right to fix other reasonable rates, provided it should not lower the rates below the standard charge in cities of like size and population. In the Cleburne case the Court

held that the agreement not to charge higher rates than the Bell rates was a good contract, even though the city might exercise the power to fix lower rates, and that the city was authorized to enforce the contract. We contend that the same conclusion follows in this case. As the court said, in the Cleburne case, it is unnecessary to consider whether the rates called for by the contract are reasonable; if the gas company made a bad bargain it must abide thereby for in such a case the courts will afford no redress.

The City of Texarkana is authorizezd to make agreements with utilities when it grants a license or permit to use the streets. Section 163 of the City Charter, printed in Appendix I, provides that the "franchise shall contain all the terms and agreements between the parties thereo, and shall expressly set forth that the council shall have the right and privilege" of regulating rates. The City of Cleburne in its grant of a franchise reserved a somewhat similar right and privilege. The promise of the utility in that case not to exceed the Waco rates was enforced. Here the promise of the utility is that the rates shall not exceed the rates across the street in Arkansas.

It is submitted, therefore, that under the Texas decisions the promise made by the gas company, not

to exceed the Arkansas rate, in return for the grant of the franchise is supported by a sufficient consideration and is binding on the utility.

(c) *The gas company is estopped to question the validity of the promise given by it to obtain a privilege which it is still using.*

Some cases so holding have been cited in the last preceding sub-section of this argument. What the city understands to be the general rule is stated in *Todd v. Citizens Gas Company of Indianapolis*, 46 Fed. (2nd) 855, (certiorari denied, 283 U. S. 852), a case decided by the Circuit Court of Appeals for the Seventh Circuit. A franchise, which had been granted in 1905, provided that after the stockholders of the gas company should have received all their investment back plus interest at the rate of ten per cent per annum, then the gas company must convey all its property to the city. The city made a demand that the company convey its property under this provision of the franchise and some of the stockholders sought an injunction in the federal court to prevent the conveyance. They urged many reasons for holding that the city did not have the power to impose the condition in the franchise which it was seeking to have enforced. As to this the Circuit Court of Appeals pointed out that the city did have the ex-

press power to prescribe the terms and conditions upon which gas companies might use its streets, and it then said (p. 866):

> "When a municipal corporation has the power to grant or refuse in its discretion permission to a public service company to occupy the streets with its structures, it may grant such permission subject to such conditions as it may see fit to impose, provided they are not against public policy or in derrogation of any right which the company may have under its franchise from the state. The municipality, by means of such conditions, may impose obligations upon the company which it would have no power or authority to impose under its general charter powers, and, if the company accepts the grant it is bound by the conditions and is estopped to question their validity."

In *Athens Telephone Company v. City of Athens*, 182 S. W. 42 (C. C. A. Dallas, 1916), it was urged that the city had no power to exact a promise as to rates from a utility when it granted a franchise. The court held that although a city might not have the power to impose such a condition on a utility without its consent, yet if the company voluntarily accepts rights granted to it with such a condition annexed,

it cannot afterwards deny the authority of the city nor refuse to perform the conditions.

This holding was repeated by the same court in *Terrell v. Terrell Electric Light Company*, 187 S. W. 966 (C. C. A. Dallas, 1916).

(d) *The fact that the city council has the power to regulate rates is not an inhibition to contracts on the part of the utility as to rates.*

The city has heretofore discussed the case of *Dallas Railway Company v. Geller*, 114 Texas 484, 271 S. W. 1106. In that case, the court was discussing whether a city, whose council had the powers of a rate regulating tribunal, could make a contract as to rates which would bind a utility, and it said:

> "The right or power to further control or regulate the grant (of the franchise) in regard to the rate schedule is a reservation to the municipality, and not an inhibition to contract; and where a franchise is accepted by the grantee, this reservation provided in the law becomes a part of the contract."

This, the city contends, is the law of Texas. It is the only time the State Supreme Court has spoken.

The city charter provides that franchises must set

forth all the terms and agreements between the city and the utility and must reserve to the city the right and privilege to regulate rates from time to time.

In *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, the city had the power to regulate rates. The franchise agreement contained a promise on the part of the utility—not on the part of the city—as to rates. This court said (189 U. S. 437):

> "People who have accepted, as experience shows that people will accept, a charter subject to such liabilities, cannot complain of them or repudiate them."

In *Southern Utilities Company v. City of Palatka*, 268 U. S. 232, 69 L. ed. 930 (1925), a franchise bound the utility not to charge more than a certain rate. It attempted to do so. The city brought suit to enjoin a charge in excess of the franchise. The utility pleaded confiscation. The state court held that the contract was good, although the legislature had unfettered power to regulate rates. The company contended in this court that there was a lack of mutuality and so the contract was void. This was the contention of the gas company here. This court said, 268 U. S. 233:

> "The argument cannot prevail. Without con-

sideraing whether an agreement by the company in consideration of the grant of the franchise might not bind the company in some cases, even if it left the city free, it is perfectly plain that the fact that the contract might be overruled by a higher power does not destroy its binding effect between the parties when it is left undisturbed. * * * There is nothing in this decision inconsistent with (among other cases) *San Antonio v. San Antonio Public Service Co.*, 255 U. S. 547, 65 L. ed. 777."

In the case of *Peoples Gaslight and Coke Company v. City of Chicago*, 194 U. S. 1, the situation was that the Illinois Legislature had passed a statute authorizing the consolidation of competing gas companies. This statute provided that the consolidated corporation should not increase the price charged by it for gas. There was a consolidation under this statute. Thereafter the city council passed an ordinance directing a smaller rate. The gas company attacked this ordinance in the federal court on the ground that the statutory provision above stated constituted a contract that it might have as much for gas as it had charged prior to the consolidation. This court, through Chief Justice Fuller, held that the statute did not fix a rate which could not be altered by either party, but did fix a rate above which the companies

which consolidated under the provisions of the statute might not go. *It left the city free to regulate rates but placed an obligation upon the consolidated companies not to go above a certain rate.*

In *Cedar Rapids Gas Light Company v. City of Cedar Rapids*, 223 U. S. 655, 56 L. ed. 594 (1912) the franchise provides:

> "In consideration of the privileges herein granted to said company it shall furnish to the inhabitants of said city gas for lighting at a price not to exceed $1.80 per thousand feet, and 20c per thousand cubic feet discount," etc.

With reference to this, the U. S. Supreme Court said (p. 667):

> "We are of opinion that there was no contract on the part of the city that the price should be kept high enough to allow a discount for prompt payment. The general power reserved to regulate rates was limited only by the fourteenth amendment. The words relied upon by the plaintiff express its promise in consideration of the privileges granted,—not a promise by the city. *Knoxville Water Company v. Knoxville*, 189 U. S. 434, 47 L. ed. 887. It is true that the contract was in the form of an ordinance,

but the ordinance was drawn as a contract, to be accepted, and it was accepted by the plaintiff; it contained reciprocal undertakings, the one in question being that of the plaintiff as we have said; and it was subject to power retained by the city to regulate rates. *That power, it was expressly provided by Iowa statute, was not to be abridged by ordinance, resolution or contract.*"

In *Henderson Water Company v. Corporation Commission*, 269 U. S. 278, 70 L. ed. 273, the water company was bound by an agreement as to rates. The Commission had authority to relieve it from this agreement. The company applied for higher rates. The Commission permitted higher rates for a six months test period. At the end of this period, the company, without going again to the commission, filed a bill to enjoin it from interfering with the collection of the higher rates. This court, through Chief Justice Taft, held:

"It was not entitled to any judicial relief from this situation, however inadequate the rates. * * * Only by securing the waiver of the franchise rates by order of the corporation commission speaking for the state, did the Water Company have any standing to ask for a fixing of

rates in excess of the franchise rates. * * * It was, therefore, plainly within the power and discretion of the commission after granting partial relief to delay further action in the same proceeding until it could satisfy itself by actual trial to what extent its waiver should go."

Here the city council, as a rate tribunal, held a full hearing to determine whether the contract should be waived. An appeal lay to the State Railroad Commission, which commission was a party to this suit and pleaded (on June 13, 1934, R. 323-326) that it was ready to hear this appeal if within a reasonable time the company filed a bond, which the state statute authorizes the commission to require on such appeals. The company refused to file the bond.

If we assume that it was the duty of the Council or the Commission to grant relief from the promise, the duty is one arising under state law for the breach of which a state remedy alone should be given.

In the *Los Angeles Street Railway case*, Mr. Justice Stone said, 280 U. S. 145 at 168:

"Granting that the contract was subject to the power and duty of the Commission to modify it by changing the rate, that power has not been exercised and the duty is one * * * imposed

by statute, for the breach of which a state remedy alone should be given."

In *Harris v. Municipal Gas Company*, 59 S. W. (2nd) 355, it was held that the Commission was authorized to demand an appeal bond. In *Box v. Newsome*, 43 S. W. (2nd) 981, it was held that where the Commission erroneously refused to hear an application made to it, the proper remedy was mandamus to force it to do so, and that the applicant was not at liberty to treat his application as granted.

The gas company in this case has contended that the fact that the city council is endowed with the power to regulate rates prevents it from binding the utility by any promise on the utility's part as to rates, even though the city in the contract does not purport to bind the city council as to the exercise of its rate regulating powers. Of course the power to regulate cannot be bartered away without specific statutory authority, but it does not follow, as the gas company contends, that, because the city cannot bind the officers who are members of its city council, the utility cannot bind itself by a promise which it must keep until it is relieved therefrom by an exercise of the regulatory power.

The gas company has argued that the city cannot make it a promise as to rates and that any promise

the company makes to the city as to rates, no matter what price be paid therefor by the city, is void for some supposed lack of mutuality. It succeeded in finding one opinion supporting this theory,—an opinion which says that such a "contract is that sort of contract which the law requires to be bilateral." This was the opinion of Judge Faris in *Nebraska Gas & Electric Company v. City of Stromberg*, 2 Fed. (2nd) 518. This is here referred to as the opinion of Judge Faris for the reason that of the three judges who sat on the case, one (Judge Lewis) dissented and another (Judge Sanborn) "concurs in the result." In that case the city had the power to regulate rates and did not try to bind itself as to rates, but the utility did bind itself. Judge Faris found the contract void. Stripped of its verbiage about "mutuality" and "bilateral contracts" his opinion was that the only price which would bind the promise of a utility as to rates was a counter-promise on the same identical matter. Outside of marriage contracts, and perhaps other similar matters, there is no principle of law which requires that the consideration to bind a promise must be a promise on the other side on exactly the same subject matter.

The gas company has also cited the following cases in support of its contentions:

*San Antonio Traction Co. v. Altgelt*, 81 S. W. 106, 200 U. S. 304, 50 L. ed. 491.

*City of San Antonio v. San Antonio Public Service Company*, 255 U. S. 547.

In the Altgelt case there was a street railway franchise providing for a five cent fare. In 1903, the state legislature passed a statute providing reduced rates for school children. Altgelt brought a mandamus action to compel compliance with this statute. The street railway company defended on the ground that the franchise was a contract and the statute was an impairment of it. The state Court of Civil Appeals did *not* pass on the question whether the franchise was a contract. It simply held that *if it was a contract*, then there was no impairment of it because it was subject to the provision of the state constitution that all such contracts might be reformed by the legislature. The power of the legislature to regulate rates cannot be relinquished by any act on its part or on the part of a city. This court said (200 U. S. 308), that, "assuming, but not deciding," that the ordinance was a contract, the question still remained whether the act of the legislature impaired its obligation, and then said:

"Even if construed as a contract it was still subject to the provision of the Constitution of

1876, which in section 17 of the Bill of Rights declared that no irrevocable or uncontrolable grant of special privileges or immunities should be made but that all privileges granted by the legislature or created under its authority shall be subject to the control thereof."

This same matter came before this court in a different way some years later in the second case, *City of San Antonio v. San Antonio Public Service Company*, 257 Fed. 467, 255 U. S. 547. Here the company sought an increase in rates under the rate regulating power of the council and the council refused it on the ground that the same old franchise was a contract for a five cent fare.

The District Court went squarely upon the theory that because the city could make no contract as to rates which the legislature could not alter, then that the city could make no contract at all. This was decided as a matter of general law, not of Texas law, and is in conflict with the later decision of this court in the *Palatka* case, 268 U. S. 232, hereinbefore discussed. The later remarks of the Supreme Court of Texas are cited below.

This court, 255 U. S. 547, affirmed the decree of the District Court. The suggestion was here made that although the city could not make a binding

promise that the rate would not be lowered, nevertheless there was a unilateral contract which bound the company to the franchise rate. As to this, this court said (255 U. S. 556) "there is not the slightest suggestion of any attempt on the part of the parties consciously to produce such a condition." In this Texarkana case, the city, whose charter provides that every franchise must reserve the privilege to regulate rates, and the utility entered into a contract which consciously and expressly attempted to bind the utility to give to Texas consumers the benefit of any lesser Arkansas rate. This court went on to say, in the San Antonio case, that from the time of the Altgelt case, the conduct of the city and the street railway showed that they did not treat the franchise as a contract.

This court, in the *Palatka* case, 268 U. S. 232, wherein it held that the fact that the legislature has the power to lower rates did not prevent a contract which was binding until that power be exercised, said that its decision was not inconsistent with this San Antonio case.

This is, however, a question of Texas law, and whtaever effect this court might otherwise be constrained to give to its own opinions, should the city contends, yield to the views of the Supreme Court

of Texas as to the effect of contracts made wtih utilities by Texas cities. In the case of *Dallas Railway Company v. Geller*, 114 Tex. 484, 271 S. W. 1106, the Court of Civil Appeals had relied strongly upon the Altgelt case and the San Antonio case in reaching its conclusion that a utility could not be bound by a contract with a city as to rates. The Supreme Court of Texas, in reviewing the opinion below, pointed out that the lower court had relied on the Altgelt and San Antonio cases, and then quoted from the opinion in the state court in the Altgelt case where that court said that legislature had the power to regulate rates, provided the rates so fixed were not so unreasonable as to amount to depriving the company of its property without due process. It then quoted from the opinion of this court where it was assumed, but not decided, that the franchise was a contract, and where this court then held that if it was a contract it was subject to the constitutional provision that no irrevocable or uncontrollable grant of special privileges could be made but that all such grants should be subject to the control of the legislature, and where this court then went on to say that the legislature could not reduce the fares to a confiscatory amount. The Supreme Court of Texas then said (271 S. W. 1107):

> "With this construction as limited and defined in the cases last cited we are in accord.

We incline to the view that the honorable Court of Civil Appeals intended to go no further than to hold in accord with the above mentioned case of *San Antonio Tr. Co. v. Altgelt,* (Tex. Civ. App.), 81 S. W. 106, in which this court refused a writ of error, and with the Supreme Court of the United States in the same case (200 U. S. 304) and the other cases cited above, *wherein it was held that a rate schedule as in this case is subject to legislative control within the limitations of the constitution and the laws which control the rights of property.* This holding in this case in no wise contradicts the holding in the case of *Mayor, et al, v. Houston Railway,* 83 Tex. [illegible] 19 S. W. 127.

"The right or power to further control or regulate the grant in regard to the rate schedule is a reservation to the municipality, and not an inhibition to contract; and, where a franchise is accepted by a grantee, this reservation provided in the law becomes a part of the contract."

Thus the Supreme Court of Texas, with the opinions of this court in the two San Antonio traction cases before it, was of the opinion that under the law of Texas a utility could be bound by a contract

with the city notwithstanding the existence of the reserved power of regulation.

The gas company has also relied on the case of *Houston v. Southwestern Bell Telephone Company*, 268 Fed. 878, 259 U. S. 318, in support of its contention that a city having the power to regulate rates cannot for any consideration purchase from a utility a promise as to rates which will bind it until it is relieved therefrom by an exercise of the regulatory power. That case does not so hold. There the contract was that, in the exercise of the regulatory power, the basis of valuation should be, not present value as this court had held, but the capital actually invested. The case arose at a time of very high prices, immediately after the government returned the property to its owners in 1919. It should be noted that whatever this court had to say about the contract may be regarded as *obiter dicta* because the trial court found, and this finding was not reversed, that even on the basis of book value, or capital actually invested, the rates in controversy were confiscatory. Hence it was not necessary for this court to pass on the validity of the contract. This court nevertheless held the contract to be void. This conclusion as to this contract is probably correct as a matter of Texas law because it is not conceivable that a rate tribunal, which cannot waive its pow-

ers, can contract that those powers be exercised in a different way or on a different basis than those provided by law. Such a principle does not conflict with the ruling in the *Henderson Water Company Case*, 269 U. S. 278, that a utility is bound by a contract as to rates until such time as it be relieved therefrom by the state. It should also be noted that in the Houston case there was an attempt to bind both parties on the same subject matter,—the manner in which the regulatory power should be exercised, and the conclusion that if one party could not be bound the other party was not bound is certainly a logical conclusion under the law of contracts. Here in the Texarkana case there was no effort to bind the city council in any way,—either not to regulate nor as to how it should regulate nor as to anything else.

4. *The fact that Section IX calls for a change in rates without a new ordinance placing the new rates in effect does not render the contract void.*

The gas company has argued that Section IX is void on the following theory. Under the Texas statute as to *railroad rates* as interpreted by the courts, *railroad rates* can only be changed by an order of the commission. If a railroad wants to lower

a rate it must first get an order from the commission. For this reason, the Texas courts have held that when a Texas intra-state rate is found unreasonable, and ordered reduced, there can be no award of reparation. Railroad rates can be "made" only by a commission order, and the commission can establish only an "absolute rate." It cannot fix either maximum or minimum rates. Such is the effect of many of the cases cited by the gas company in its response to the petition for writ of certiorari. None of these cases bear on utility rates in cities.

The gas company has argued that this rule applies to gas rates,—that a gas rate can only be "made" by an ordinance of the city council, that Sextion IX, in providing that the rate should be changed if the Arkansas rate be lowered, calls, therefore, for an illegal change in rates, and that, if valid, it cannot operate to give the Texas consumers the benefit of a lower Arkansas rate until the rate making body passes a new ordinance prescribing the Arkansas rate as an absolute rate.

This may have been what the Circuit Court of Appeals had in mind, although it does not say so. Its opinion constantly refers, not to the power to "*regulate*" rates, but the power to "*make*" rates. That court, and the learned judge who wrote its opinion,

have had occasion to deal with reparation under intra-state railroad rates in Texas. It is difficult to believe that so learned a court can think, in the face of plain language of Section IX and in the face of the City Charter, that Section IX is really an undertaking on the part of the city to bind the city council not to exercise its rate regulating powers, if occasion demands, by fixing a rate either higher or lower than the Arkansas rate. Yet that court can say: "A more definite binding of the hands of the City Council, a more complete abdication of its *rate making* function, a more complete delegation of it could hardly be imagined." Such language from such a court is understandable to the city only upon the guess that what the court had in mind, without expressing it, was that gas rates in cities are like intra-state railroad rates in Texas,—rates which can only be "made" by an ordinance placing a new definite rate in effect.

Such a theory is wrong. It is not the law in Texas that gas rates can only be "made" by an order of a rate tribunal, that any rate other than an "absolute" rate, prescribed in the order of a rate tribunal, is unlawful. Even in the case of the Railroad Commission the rule as to gas rates is different from the rule as to railroad rates. The statute, which gives the Commission some jurisdiction over gas rates,

provides that if the Commission finds a gas rate to be unreasonable it may award reparation. See Article 6055 of the Revised Statutes, printed in Appendix III to this brief. The cases relied on by the gas company all have to do with railroad rates.

As to the rate regulating powers of city councils, it is not the law that every city utility rate must be put in effect—must be "made"—by an ordinance of the council, and it is clear also that the power of the council is not restricted to the establishment of "absolute" rates, that is, rates which cannot be changed, either up or down, except by a new order from the council fixing a new absolute rate.

In *Parsons v. City of Galveston*, 125 Tex. 568, 84 S. W. (2nd) 996, 1000, the Supreme Court of Texas said:

> "The right to fix a minimum as well as a maximum rate seems now to be settled."

In that case the Supreme Court of Texas upheld an ordinance fixing minimum fares for taxicabs. It quoted with approval the decision of the court of civil appeals in the case next cited.

In *Community Natural Gas Company v. Natural Gas & Fuel Company*, 34 S. W. (2nd) 900 (C. C. A., Austin, 1930), there were two competing gas com-

panies in the City of Brownwood, a city whose council had the power, under the general statute. to regulate rates, and from whose rate orders the same appeal lay to the Railroad Commission as lies from rate orders of the Texarkana City Council. Both companies operated under franchises. The franchise rates of the Community company were the higher rates, and the council, after a hearing, ordered a reduction in these rates. The Community company appealed to the Railroad Commission, and while this appeal was pending, the parties agreed on a compromise, and the council embodied the compromise in an ordinance fixing maximum rates. (The court specifically points out (p. 902) that the franchise rates of the Fuel Company were not designated as maximum rates.)

The Fuel Company then reduced its rates below its franchise rates. The Community Company promptly responded with a drastic rate reduction, and the Fuel Company then brought suit to enjoin the Community Company from charging less than the compromise rates set up in the ordinance above referred to. The trial court awarded the injunction.

The Fuel Company contended, just as the respondent gas company here has contended, that the ordi-

nance fixing the Community Company's rates was an exercise of the rate regulating powers of the council and that no other rate could lawfully be charged by that company until a new rate making ordinance be passed. The Community Company, on the other hand, contended that the statute only authorized the fixing of maximum rates. Both contentions were overruled.

The court first said (p. 902): "Whenever the question has arisen, this power has been construed as extending, not only to the fixing of maximum, but also of absolute rates."

The court then went on to hold that the action of the city council of Brownwood were not a fixing of absolute rates. It said, p. 902:

> "We do not regard the action of the city in granting the several franchises and amendments thereto as an exercise of its rate-making powers under Article 1119. * * * All that it did, as we interpret the several franchise ordinances, was to fix maxima for each corporation, leaving them free to compete in the matter of rates within the maxima."

The court therefore dissolved the injunction, because the judgment below was "necessarily based upon the proposition that, under the Community

Company's franchise and Article 1119, it could not make rates below the maxima without further authority from the city." The court went on to say that whether either a minimum or an absolute rate should be fixed was a question for the city council, that it had not yet fixed an absolute rate, and that, until it acted, the court could give no relief from the rate war.

In *City of Seymour v. Texas Electric Service Co.*, 66 Fed. (2nd) 814 (C. C. A., 5th Circuit, 1933), a minimum rate ordinance had been passed to protect a municipally owned light plant. The ordinance expressly stated the rates were minimum rates and any utility could charge as much more as it desired. The rival light company sought to enjoin the enforcement of such a minimum rate. The court, after reviewing the cases, and citing among others the Community Company case in 34 S. W. (2nd) 900, held that the Council had authority to fix a minimum rate, and the court then said:

> "The Texas cases cited hold that the authority conferred by statute to regulate is authority not only to fix the same minimum rates, but the same absolute rates for municipally and privately owned utilities. * * * in owning and operating a utility plant a city acts not in a govern-

mental but in a proprietary capacity; when the council, exerting the power to regulate, comes to fix rates it represents not the city, as proprietor, but the state as regulator. It exerts not the contractual power of the city, but the sovereign power of the state."

The court, in its further discussion, pointed out that cities have power to contract as to rates as well as power to regulate rates. In this connection the court is asked to recall the holding of the Court of Civil Appeals in the Community Gas Company case above, that the action of the council in granting a franchise, setting out the rates, was not an exercise of the council's rate regulating powers. The court, in the City of Seymour case, said (66 Fed. (2nd) 817):

"The right to contract for rates and the right to exert the police power in regulating them are entirely distinct powers. The first, the city has under its general powers; the latter, it has only when a statute has conferred it."

The law of Texas, as stated in the above cases, is that a Texas city has two classes of powers as to rates. The rate set up in a franchise contract need not be the result of an exercise of the rate regulating powers. When it comes to the exercise of the

rate regulating powers, there is no requirement that "absolute" rates be fixed,—that is, a rate which must be explicitly followed wtihout variation until a new rate order be made. The city may fix either an absolute or a maximum or a minimum rate, and what rate it has fixed in any particular instance must be determined from the order made and from an examination of the circumstances.

The fact that there may be a lawful rate in a Texas city other than an absolute rate is recognized by the gas company in this case. The very Section V of the 1930 franchise (R. 13-16) which the gas company now contends fixes an absolute rate because, according to its contention, no other kind of rate can be legally fixed, permits the company to determine its own rates as to large consumers by private contract with such customer. The application filed by the company on November 3, 1933, for an increase of rates asks for permission to fix rates by private contract not only with *all* industrial consumers (not merely the large ones as did the franchise of 1930) but also with large commercial consumers. It is certainly anomalous for the company to contend that the only legal way to establish rates is by an order from the Coucil fixing an "absolute" rate, when it is now and has been operating under a franchise which permits it to fix rates by private contract, and

where it asked authority to enlarge the class of consumers whose rates might be so fixed.

Assuming then, what the cases show to be the law, that there is no requirement that rates in cities be fixed as "absolute" rates, but that either minimum or maximum or absolute rates may be fixed, it remains to consider what was done when the franchise of 1930 was granted and accepted.

No reason existed for fixing either absolute or minimum rates as to domestic and commercial consumers. There is no competing gas company in Texarkana.

Next, it is very doubtful if there was any exercise of the power to fix or regulate rates. There was an exercise of the power to contract.

The gas company had applied for an increase in rates. The city council, as the rate tribunal, had refused the increase and the company had appealed to the Railroad Commission. While the Commission was sitting in Texarkana hearing the appeal (R. 125), a compromise was agreed upon, the parties agreeing to a smaller increase than the company asked and the city agreeing to grant a new franchise, on certain conditions, to replace the existing franchise which was about to expire. The franchise itself states (R. 13) that the rates are determ-

ined by "compromise agreement." Rate tribunals do not make compromise agreements. The gas company says (R. 133) that the city insisted upon Section IX being a part of the agreement. The agreement recites (R. 13) that the rates to be charged "are hereby determined and fixed by compromise agreement." The city (R. 133) initiated and inserted Section IX as a part of the agreement. Section IX is an essential part of what was done, and must be considered in determining whether what the council did was to fix an absolute rate, or whether it was making an agreement as to maximum rates, which agreement had to be and was subject to the possible future exercise of the regulatory power.

In the *Community Company case* (34 S. W. (2nd) 900) the court held, under similar circumstances, that the granting of a franchise was not the fixing of an absolute rate. "All that it did, as we interpret the several franchise ordinances, was to fix maxima."

What the Council did in this compromise agreement was to grant maximum rates, and it embodied in this grant of a maximum the proviso that the maximum rate should not exceed the Arkansas rate. The company accepted the grant "with its terms and provisions (R. 19).

Such a provision cannot be regarded as a delegation of the rate regulating power of the city council. It is simply an agreement on the part of the gas company do to what it is already legally bound to do. Discrimination is one of the oldest bases for the exercise of the rate regulating power.

In border town situations, such as that at Texarkana, the question of discrimination against the citizens of one state or the other constantly arises and has to be constantly guarded against. In *Bollinger v. Watson*, 187 Ark. 1044, 63 S. W. (2nd) 642, the Supreme Court of Arkansas had before it the gasoline tax statute of that state which imposed a six cent per gallon tax, but provided that in the border towns the tax should be at the rate fixed by law in the adjoining state, but not to exceed six cents. As a result of this, the tax in Texarkana, Arkansas, was at the Texas rate of 3 cents, in towns on the Missouri line was at the Missouri rate of 2 cents, etc. The court upheld the statute as a practical means of dealing with a special situation. The same thing arose in the matter of sales taxes, and that court again upheld a similar treatment of the same problem in *Wiseman v. Phillips*, 191 Ark. 63, 84 S. W. (2nd) 91.

If a state, in imposing taxes, may deal with this

special situation in this way, no reason can be imagined why a utility serving both sides of a border city may not bind itself not to charge a higher rate in one state than in the other,—why it may not bind itself, in return for the grant of the privilege of using the streets. not to force the city to call upon the rate regulating powers of its city council in order to prevent discrimination but to accept and abide by the lawful rate in the Arkansas city as the maximum rate in Texas. Such a promise of the gas company can only be regarded as a delegation of the rate regulating powers of the city council upon the erroneous theory that there can be no legal change in rates in a Texas city except a change "made" or "imposed" or "prescribed" by an order of the rate tribunal establishing an "absolute" rate. That theory may be the law as to railroad rates in Texas, but it is not the law as to gas rates in cities and no statute and no decision indicates that it might be the law. On the contrary, the cases show that rate tribunals may fix either maximum or minimum or absolute rates, and further that the rates in cities may not only be "fixed" by rate regulating tribunals but may be agreed upon by contract between the city and the utility, provided that such contract is subject to the exercise of the regulatory power which cannot be waived. Under such precedent as there is (*Hender-*

*son Water Company v. Corporation Commission*, 269 U. S. 278), such a contract binds the utility until the regulatory power grants relief therefrom. Here the regulatory tribunal, the city council, after hearing, found that no relief should be granted. The gas company appealed to the Railroad Commission, which has power as a regulatory tribunal to grant relief, and then refused to file the bond demanded by that commission,—a bond in the sum of $10,000,-00. The city believes the statute gives the Commission power to demand a bond. The company contends otherwise, but the Texas courts have said that in the event the Commission erroneously refuses to consider a matter brought before it the proper remedy is mandamus to compel it to do so. See *Box v. Newsom*, 43 S. W. (2nd) 981 (C. C. A. Waco, 1931).

No reason exists which prevents a city and a utility from making an agreement, subject of course to the future exercise of the regulatory power, for a simple remedy against discrimination. Discrimination as to rates is unlawful and the Texas courts have held that they have power to prevent such discrimination by injunction without any action from any rate regulating tribunal. This holding also sheds light on the error of the gas company's contention here that there can be no lawful rate except an

"absolute" rate, "made" by a formal order of a rate regulating tribunal.

*Dallas Power & Light Company v. Carrington*, 245 S. W. 1046 (C. C. A. Dallas, 1922), presents these facts. The Town of Highland Park is a suburb of Dallas, Texas, but is a separate municipality. The same light company served both municipalities at the same rates. In 1920, it divided its territory into two districts, one being the town and the other being the city. Rates in the town were raised above those in the city. Many persons in the Dallas district resided at much greater distances from the power plant than persons in the Highland Park district. The town council tried in various ways to force the company to use the same rates in Highland Park as in Dallas. All these attempts were held void for one reason or another. Then some consumers in Highland Park brought suit to enjoin further discrimination. Article 1125 of the Revised Statutes authorizes courts to enjoin all extortionate and unreasonable rates. The court found that both the city and the town were served by the same plant. The consumers in Highland Park lived no further from the plant than the citizens of Dallas and it cost no more to supply them than it cost to serve a great many Dallas consumers. The company could zone or classify all its customers, but it might not do this on the

basis of town lines. Such zones must be based on physical situations and conditions. The court thereupon enjoined the discrimination involved in fixing rates purely upon a city limit basis. The court also held that it made no difference that the company could not earn a fair return on its whole business. It must earn such a return without discrimination based on arbitrary zones or districts, based purely on city limits.

Such being the law, there can be no public policy which forbids an agreement on the part of the gas company that higher rates in Texas than in Arkansas would be unjust discrimination and that it will avoid such discrimination. All the gas for both towns is delivered to the distributing plant in Texas. Certainly many, if not all, of the Texas consumers are much closer to the city gate than the majority of Arkansas consumers. No public policy can forbid the parties from settling by agreement that no reasons exist for higher rates in Texas than in Arkansas and that there will be no higher rates in Texas than in Arkansas.

So far as the City knows, there can be no reason for holding such an agreement to be void or unenforcible except the erroneous theory that there can be but one lawful rate in a Texas city and that is an

"absolute" rate which can not be varied except by a new formal rate order of the City Council putting a new rate in effect. The cases cited above show that this theory is erroneous; that franchise rates are not always rates fixed by a rate tribunal but may be contract, "compromise agreement," rates; and that when the council, as a rate tribunal, does "fix" rates it may fix either a maximum or an absolute or a minimum rate.

The city thinks the franchise rates of 1930 in this case were fixed by agreement, a part of which was that in no event should the company charge more in Texas than in Arkansas. If the franchise be construed not as a contract but as an exercise of rate fixing powers, then the rate fixed was a maximum rate with the condition that in no event should the maximum exceed the Arkansas rate. The action of 1930 cannot be construed as a fixing of an "absolute' rates, except by disregarding the statement in Section V that the rates are arrived at by compromise agreement and by treating Section IX, which the gas company says the city insisted upon as a part of the agreement, as though it were not in the franchise at all.

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It is submitted that Section IX of the franchise

is a valid agreement fixing maximum rates and that the City should be able to enforce it in this case; and that the Circuit Court of Appeals erred in holding otherwise.

## POINT B.

SECTION IX OF THE FRANCHISE IS APPLICABLE TO THE ENTIRE PERIOD COVERED BY THIS SUIT.

1. *It applies to the period from December 1, 1933, to February 16, 1934, and the Circuit Court of Appeals erred in holding otherwise.*

From June 13, 1930, to December 1, 1933, the gas company charged in Arkansas the higher rate obtained by the compromise agreement of 1930. On December 1, 1933, it was ordered by a final decree of the United States District Court in Arkansas, copied in full at R. 68 and following, to cease charging the higher rate in Arkansas and (R. 72) to charge the lower (45c) rate on all bills after that date, which lower rates are set out in full in that decree. This was a final decree, rendered in compliance with the mandate of the Circuit Court of Appeals for the Eighth Circuit in a case where this court had denied certiorari and then overruled a petition for rehearing thereon.

In compliance with this decree the gas company charged the lower rate in Arkansas until February 16, 1934. The District Court in Texas held that Section IX applied to this period and ordered the company to make refunds to its Texas consumers for this period.

The Circuit Court of Appeals held that Section IX was not applicable at all, and reversed the decree. It did not explain this holding.

There are only two possible bases for this holding. Neither basis can justify it.

The first is an argument of the gas company to the effect that prior to December 1, 1933, it had applied to the Arkansas city council for an increase in rates and that the application was pending at the time the decree was entered and so its compliance with the decree was not a final compulsion but merely a temporary interlude between losing one case as to rates and getting into court with the next case, which it did on February 16, 1934.

This argument cannot be sound. The court knows there is no *res judicata* in these rates cases. A utility can apply to a rate tribunal at any time for an increase in rates and the tribunal must hear it, and years of time can be, and usually are, consumed before the tribunal and the courts can dispose of the

matter, and then the utility is free to start all over again. The case which the gas company began in Arkansas on February 16, 1934, was finally disposed of on Oct. 10, 1938, when this court denied certiorari, and the time for asking a rehearing thereon will not have expired when this brief is filed. The fact that a new application may be filed before or soon after one decision becomes final does not mean that the gas company has not been finally compelled to lower its rates. The Arkansas decree of December 1, 1933, was a final decree. It directly ordered the company to place the lesser rate in effect.

The second possible basis for the holding that Section IX is not applicable to the period from December 1, 1933, to February 16, 1934, is the theory, heretofore discussed, that there can be no lawful rate in Texas except an "absolute" rate established by an order of a rate tribunal. The city has heretofore shown that this is not true as to utility rates in cities and that there can be contracts as to maximum rates. Section IX is a contract as to a maximum rate to avoid discrimination and it certainly applied to this peroid when the utility, under an express order of the court, was serving at a lower rate in Texarkana, Arkansas.

2. *Section IX applies to the period from Decem-*

*ber 4, 1936, to the present time. The Circuit Court of Appeals erred in holding otherwise, and the District Court erred in refusing to apply it to this period at the present time.*

When the District Court finally disposed of this case the gas company was again charging the lower rate in Arkansas. On February 16, 1934, a temporary injunction had been obtained protecting a higher rate in Arkansas. On Dec. 4, 1936, this injunction was dissolved and refunds ordered down to the basis of the 45c rate for the period covered thereby. An injunction pending appeal was denied (R. 119) and the old 45c rate has been in effect in Arkansas since Dec. 4, 1936. This was called to the court's attention by a supplemental bill and it was asked to order the company to put the lesser rate in effect in Texas and make refunds for all excess collections back to Dec. 4, 1936.

The District Court decree (R. 235), in so far as the bill sought a present reduction in rates and refunds for this period, dismissed the bill without prejudice to a new suit in the event the Arkansas decree be affirmed.

Of course, in July, 1937, when the District Court acted, the outcome of the Arkansas case could not be known. But it was then known that for the period

from Dec. 4, 1936, up to such time as the Arkansas decree of that date might be reversed, if it should be reversed, the company was finally compelled to place the lower rate in effect in Arkansas. Regardless of the final outcome, the rate of 45c was finally in effect in Arkansas for the period from Dec. 4, 1936, until the appeal be finally decided. If the decree had been reversed it could have no effect on the interim period. The order of the Arkansas rate tribunal on December 22, 1933, (R. 114) expressly ordered the company not to increase its rates above the 45c rate. The decree of Dec. 4, 1936, left that order finally and completely in effect until such time as a new decree might be entered.

On December 4,, 1936, and long prior thereto, this suit was pending to force the company to put the 45c rate in effect in Texas.

3. *Section IX applies to the period from June 13, 1930, to Dec. 1, 1933, and the District Court and the Circuit Court of Appeals erred in holding otherwise.*

This ruling of the District Court, and the city's exceptions, appear on R. 234 and R. 237, and are assigned as error on R. 414 (Assignment No. 3 and No. 6).

Prior to May, 1930, the rates in Texarkana, Texas,

and Texarkana, Arkansas, both of which cities were served by the same utility company, were the same. Similar increases were granted about June 1, 1930, in both cities, in Arkansas by an agreement adopted on May 30, 1930, and in Texas, because of delay necessary for publication, in a franchise contract adopted by the city on June 13, 1930, and accepted by the company on June 17, 1930.

The Texas agreement provided (R. 18) that if the company was compelled to, or should voluntarily, place in effect in Arkansas, any rates less than the increase then being granted in Texas, "then and thereupon the lessened rtae shall apply in the City of Texarkana, Texas, and grantee shall not be authorized or permitted to charge and collect any higher rate."

The question is, what does this agreement mean? The parties were obviously trying to agree that Texas consumers get the same treatment as to rates as the Arkansas consumers. The sense of the agreement is that the effective date of any lesser rate for Arkansas consumers should be the effective date of such lesser rate to Texas consumers. If it means anything else, let us see what the result will be as applied to the facts here involved.

During the entire period from June, 1930, down to

December, 1938, the Texas consumers have paid a higher rate, which we call the $1.00 rate.

The net rate paid in Arkansas from June, 1930, to February 16, 1934, was 45c.

Arkansas now has a final judgment for refunds down to a 45c basis for the period from Feb. 16, 1934, to Dec. 4, 1936, and has been actually paying the 45c rate since Dec. 4, 1936. When this judgment has been carried out, Arkansas will have paid 45c from June 13, 1930, to date. Texas has paid $1.00 all the time. Can the company be allowed, under the meaning of its franchise agreement. to keep all the excess collected in Texas for the whole period when the Arkansas rate was in litigation, that is for the whole of more than eight years, except for the two and a half months from Dec. 1, 1933, to Feb. 16, 1934, when the Arkansas rate was not actually in court?

We submit that this is not the meaning of the contract. Suppose, after the $1.00 rate had been in effect in Arkansas for six months the company had voluntarily reduced it, effective back to June 13, 1930. Could it be contended that the non-discrimination agreement does not mean that the Texas consumers are entitled to the benefit of the reduction in the same way and to the same extent that the Arkansas consumers get such benefit. Under the

contract there is no difference between a voluntary reduction and one the company is compelled to make.

The contest on the Arkansas rate began at once after it was raised on May 30. 1930. The gas company kept the contest in court until Dec. 1, 1933, when it was compelled to place the old rate of 45c in effect *as of May 30, 1930.* The contract does not mean that by reason of such prolonged litigation, the company can take from its Texas consumers some $75,000 more than they should pay if they get equal treatment.

The company insists that the emphasis should be placed on the words "finally compelled" in the contract,—th. as long as it can keep the Arkansas rate in court there is no discrimination as to Texas. Since December 4, 1936, the Arkansas consumers have been paying 45c although the company has had pending an appeal from a decree refusing to enjoin that rate. The validity of the 45c rate is now finally determined. Under the construction contended for by the gas company, that the 45c rate was not finally compelled in Arkansas until this court had spoken, it can keep the excess collected in Texas for two years, during which time a lesser rate has been actually collected in Arkansas.

Such is not the meaning of the contract. It was

finally decided in Arkansas on Dec. 1, 1933, that the rate from May 30, 1930, to December 1, 1933, was 45c and the company was then finally compelled to put it in effect for that entire period. We submit that then and thereupon the Texas consumers were entitled to the same rate for the same period.

In *III Williston on Contracts* (Revised Edition) Sec. 619, it is stated that in interpreting a contract the main purpose of the instrument will be given effect. The same rule is laid down in Sec. 236 of the *Restatement of the Law of Contracts.* The main and principal apparent purpose of this contract was to prevent discrimination as to rates against the Texas consumers. To carry out the main intention of a contract, words may be transposed, rejected or supplied if necessary to make its meaning clear. In Sec. 617 of the same volume of Williston, it is stated that "The general intent so far as it is manifested is more important than particular words, and the courts will look beyond the form of the agreement and consider the substantive rights created in determining its legal effect."

The Supreme Judicial Court of Massachusetts, in *Koshland v. Columbia Ins. Co.*, 237 Mass. 467, 130 N. E. 41 at 43, in explaining the well known rule that insurance contracts are to be construed against the

insurer in cases of ambiguity, states one reason for the rule to be: "The purpose of such a contract is to indemnify against the losses to which the insurance relates, and *every rational intendment is made by the law to effectuate the main design of the parties.*" There can be no doubt that the main and only design of the city is this contract was to prevent discrimination against Texas consumers—to secure for them the same treatment the company might be compelled to give in Arkansas—and that the company agreed to this as a consideration for getting a renewal of its expiring franchise and of getting an increase in rates "by compromise agreement."

In *Marx v. American Malting Company*, 169 Fed. 582 at 584 (C. C. A. 6th), the court said:

> "It is a fundamental rule in the interpretation of agreements that we should ascertain the prime object and purpose of the parties, and, in case of ambiguity produced by its minor provisions, the latter should, if possible, be so construed as not to conflict with the main purpose. * * * In many cases a more stringent rule has been laid down, which is that, if the minor provision of the contract is irreconcilable with the obvious general intent, it would for that reason

be sacrificed altogether for the promotion of the general purpose of the agreement."

In that case there was a contract for the sale of malt at a fixed price. There were two statements as to the amount. One called for all the buyer's requirements up to a certain date. The other was "amount of malt to be used *will be* between 15,000 and 20,000 bushels." The seller supplied 20,000 bushels and, the price having gone up, refused to supply more. The court said it was clear enough that the parties intended to contract for the year's supply and that the statement of a definite amount should be interpreted to be a mere estimate, or sacrificed altogether.

In the face of this franchise agreement the company cannot contend that any reason exists why it should be permitted to charge more in Texas than in Arkansas. The very least effect that can be given to it is that it is a binding admission on the part of the company that no facts exist justifying a discrimination. The meaning of the contract against discrimination ought to be interpreted in view of the long recognized rule that one against whom a public utility has discriminated can recover for such discrimination. The question as to the measure of damages has been altered by statute, but as we

understand it, the common law rule was applied in *Hays v. Pennsylvania Company*, 12 Fed. 309, (Circuit Court, N. D. of Ohio, 1882). In that case the regular rate for coal was $1.60 per ton, with a rebate of 30c to 70c per ton to all persons shipping 5,000 tons or more per annum. The plaintiff was a small shipper. He paid the $1.60 per ton and sued for the excess paid over the rates of his most favored competitors. The court found that the discrimination was unjustified and gave him judgment for such excess. This rule was changed by the Interstate Commerce Act to limit the recovery to actual damages as proven, but it was not until 1913 (*Pennsylvania R. Co. v. International Coal Mining Co.*, 230 U. S. 184, 57 L. ed. 1446), that the Supreme Court held that under the Act the one injured by discrimination must offer any other proof of damages than the difference in rates, and in so doing it reversed a unanimous opinion of the Circuit Court of Appeals and based its decision as to the meaning of the statute upon matters of convenience.

Neither the common law rule nor the statutory rule, which applies to the violation by a utility of its duty not to discriminate applies to this contract, but they are here cited as circumstances to aid the court in determining what is the meaning of the contract. Under both rules, the injured party is entitled to

something for the period during which the discrimination took place,—not merely to an order preventing future discrimination. Where, as here, there is an expressed promise that the rate to one shall not exceed the rate to the other, and there is a violation of this promise, the only adequate relief is to place the injured party in the same position he would have been in if the promise had not been violated.

The whole purpose and intent of the contract was that when lessened rates should apply in Arkansas, they should apply in Texas. The lessened rates applied in Arkansas during the period from June, 1930, to December 1, 1933, although this was not finally decided until December 1, 1933. The decision of the Federal Court in Arkansas did not apply the lower rate retroactively. It simply decided that the lessened rate had applied in Arkansas since June, 1930, and gave effect to that decision through a judgment for refunds of all collections over the rate the court found had been legally applicable.

The cases cited by the company with reference to the refusal of the courts to award reparation when a rate, which has been placed in effect by an order of a rate regulating tribunal, is later found to be too high, have no application here. The rate under which the company collected the excess in Texas

kana, Texas, is recited in the franchise itself to be "determined and fixed by compromise agreement," (R. 13), which agreement was not effective until accepted in writing by the gas company, and which agreement contained as an integral part thereof, and as an integral part of the rate itself, the promise of the gas company that it would give to Texas the benefit of any lower rates its Arkansas consumers might obtain. In so far as cases with reference to awards of reparation by the Interstate Commerce Commission are relevant at all, the ones which apply here are those which still award reparation where the rate found to be too high is one established by the carrier on its own initiative, rather than the cases denying reparation where the rate found to be too high is one which the Commission had ordered to be placed in effect in the first place.

In connection with the company's contention that the rates set up in the franchise contract of June 13, 1930, were rates placed in effect as a result of an order of the rate regulating tribunal, and its argument, based on the cases refusing reparation in the case of rates fixed by orders of the Interstate Commerce Commission, and various state commissions, that no refunds can be ordered for amounts collected under such rates, the court is asked to consider the case of *Community Natural Gas Co. v. Natural*

*Gas & Fuel Co.*, 34 S. W. (2nd) 900, a case heretofore discussed. In that case maximum rates had been fixed by franchise agreement between a gas company and the city of Brownwood. In competition with another gas distributor the company charged less than the rates fixed in the franchise and the competitor sought to enjoin the company from charging any less than the franchise rates. This relief was denied it, and the Court of Civil Appeals at Austin held that the action of the city in granting a franchise was *not* an exercise of the powers vested in the city council as a rate regulating tribunal, and that, in the absence of an order making an "absolute" rate, a rate lower than the franchise rate was a lawful rate. The "lawful" rate for this entire period was the lesser rate in effect in Arkansas.

In connection with the company's contention that in interpreting the contract emphasis should be placed on the phrase "finally compelled" the situation in Arkansas should be examined in order to ascertain when the final compulsion took place.

As stated, rates in Arkansas were raised by means of a compromise agreement embodied in a resolution of the city council. This resolution was subject to a referendum as was judicially determined in the case of *Southern Cities Distributing Company v.*

*Carter*, 184 Ark. 4, 285 U. S. 525. Referendum petitions were promptly filed. See 184 Ark. 4 at 6. The Arkansas law provides that when a measure is referred to the people it shall remain in abeyance until the election is held. The election was held and the agreement was rejected and by the decree of December 1, 1933, it was judicially determined that the company had never had the right to charge the higher rate in Arkansas. R. 186. The company was compelled to use a lesser rate in Arkansas all the time from June 13, 1930. The decree of December 1, 1933, was not the final compulsion. It was simply a judicial ascertainment that the final compulsion had taken place long prior thereto, and that the compulsion which had taken place long prior thereto was final at the time it took place.

There can be no escape from the conclusion that for the period from December 1, 1933, to February 16, 1934, the company was finally compelled to use a lower rate in Arkansas because the decree of December 1, 1933, not only judicially determined that there had been prior thereto a final compulsion to use the lesser rate but ordered and directed the company to continue to use it. The fact that there was then pending before another tribunal, an administrative or legislative rate tribunal, an application to be relieved from such compulsion cannot alter the fact

that for that period the compulsion was final and irrevocable.

On December 22, 1933, there was a final order on the part of the administrative rate tribunal directing the company to continue to charge the lesser rate in Arkansas and forbidding it to charge any higher rate. It has taken from February 16, 1934, to October 10, 1938, for the courts to determine that this was a lawful order from which no relief should be given, but the decision of the court is not the compulsion that operates upon the company. The decision of the court is simply a judicial determination that the original order was lawful and valid and final. The thing that compels the company to charge the lesser rate in Arkansas now is not an order of any court but is the final order of the city council of December 22, 1933, which the courts have at last determined was a lawful and proper order, but the fact that the courts have taken such a long time to decide the question does not alter the fact that the order was final on December 22, 1933.

It might be pointed out that the Arkansas statutes provided for a review of the order of the city council before a tribunal which was authorized to enter such order as the council should have entered in the first place if its order was improper. The time for

this review has long since expired. The company instead of seeking this review sought to enjoin the order in the Federal Court on the ground that it was unlawful. The Federal Courts have decided that the order was lawful. The final compulsion took place when the order was made, not when the courts reached the conclusion that it was lawfully made.

It cannot have been the meaning of the contract that the Texas consumers should have to pay, without the possibility of any refunds, the higher rate while the ompany was trying out in the courts the validity of the Arkansas orders which finally compelled it to place lesser rates in effect in Arkansas.

It is submitted that the court erred in this case in refusing to order refunds for the period prior to December 1, 1933. For this period the rate legally applicable and enforced in Arkansas was a lesser rate than in Texas. To permit the company to keep the proceeds of a higher rate for the same period for its Texas consumers is a violation of the plain meaning of its promise to apply to Texas the benefit of the rates in effect in Arkansas.

4. *The District Court erred in dismissing without prejudice that part of the bill seeking refunds for the period from Feb.* 16, 1934, *to Dec.* 4, 1936, *and the Circuit Court of Appeals erred*

*in holding Section IX was not applicable to this period.*

The finding of the District Court is on R. 235 and the city's exceptions are on R. 236 and R. 237. Error was assigned on R. 414 and 415 (Assignments No. 5 and No. 7).

The facts are that on December 1, 1933, the Federal court in Arkansas compelled the gas company to place the 45c rate in effect in Arkansas. On December 22, 1933, the Arkansas city council, after a hearing, ordered the company to continue to furnish gas at the net rate of 45c. On February 16, 1934, the gas company obtained a temporary injunction under which it collected until December 4, 1936, a higher rate in Arkansas than it actually collected in Texas. On December 4, 1936, this injuntion was dissolved and judgment given in favor of the Arkansas consumers for all sums collected during this period in excess of what should have been paid under the 45c rate. This judgment for refunds was superseded pending an appeal. It has now been affirmed, but the appeal was pending when the District Court acted.

During this period, the company collected in Texas a higher rate than the 45c rate.

On January 15, 1934, the city filed (R. 81, its

amended bill in cause No. 106, in which it prayed (R. 61) that the company be ordered to place the 45c rate, then being collected in Arkansas, in effect in Texas.

On May 23, 1934, (R. 264) the city filed its original bill in cause No. 109, in which it prayed (R. 282) that the company be compelled to place the lower Arkansas rate in effect in Texas, and then prayed (R. 282):

> "If, for any reason, the Court should find that the defendant should be permitted to continue to charge its present rates pending the determination of said rate litigation now pending as to the rates in Texarkana, Arkansas, then the Court should permit the defendant to continue to charge its present rates *only* upon condition that it give bond, in a sum to be fixed by the Court, conditioned that in the event it is not successful in maintaining the rates which it is now collecting under a temporary restraining order in Texarkana, Arkansas, and is compelled to make refunds down to the basis of a lower rate, then that the Company should also make refunds to its consumers in the City of Texarkana, Texas, down to the basis of such lower rates."

On December 30, 1936, the city filed (R. 121) its supplemental bill in the consolidated cause, in which it prayed that the company be ordered to deposit the excess collections for this period in the registry of the court, and that (R. 113) "the amount of the excess collected during the period from Feb. 16, 1934, to Dec. 4, 1936, be held in the registry of the court pending decision of the appeal in the Texarkana, Arkansas, gas rate case."

The court found that this claim was premature (R. 235) and dismissed the bill as to it without prejudice to a new suit in the event the Arkansas case should be affirmed.

The company had, as to this claim for refunds, already pleaded (R. 149) all the statutes of limitation, the 2 year statute, the 4 year statute and the 5 year statute.

We have no quarrel with the finding that refunds for the period from Feb. 16, 1934, to Dec. 4, 1936, should not have been actually paid out to the Texas consumers prior to the decision of the Arkansas appeal. The city did not ask this. It did ask that the money be paid into court or that a bond be given. Even if the court preferred some other form of protection, we should be content.

But we do contend that the court erred in dismiss-

ing the bill for this period and thus exposing the Texas consumers to the risk of having their rights barred by the statute of limitations. The company has already pleaded the statute and will doubtless do it in a later suit. If either the two year or the four year statute applies, they may now be a defense to a large part of the refunds in a future suit if the present suit goes off the docket.

The lower court ought to be directed to restore this cause to its docket, in so far as this period is concerned, and, the Arkansas appeal being now disposed of, to give judgment for refunds for this period. The Texas consumers ought not be compelled to bring a new suit to which a plea of the Statute of Limitations may be a bar.

## CONCLUSION.

It is submitted that the decision of the District Court, that Section IX of the franchise is valid and enforcible, is correct, that the Circuit Court of Appeals erred in deciding otherwise and that its decision is in conflict with an applicable state statute and applicable decisions of the state courts and should be reversed.

It is further submitted that Section IX is applicable to the entire period covered by this suit, from June 13, 1930, to date, and that this cause should

be remanded with directions that there be entered an order to place the lesser Arkansas rate in effect in Texas and to make refunds to the Texas consumers down to the basis of such lesser rate for all amounts collected in excess thereof from June 13, 1930, to date.

Respectfully submitted,

Ed. B. Levee, Jr.

ED B. LEVEE, JR.,

Benjamin E. Carter

BENJAMIN E. CARTER,

*Counsel for Petitioner, the City of Texarkana, Texas.*

TEXARKANA, TEXAS,
NOVEMBER 5, 1938.

## APPENDIX I.

## EXTRACTS FROM CITY CHARTER.

The defendant pleaded (R. 123) that the City of Texarkana, Texas, was incorporated by a special act of the State Legislature which defines and limits its powers.

The following are certain sections of the City Charter pleaded by defendant, which are considered applicable. The italics are ours.

SECTION 160 (R. 164). "The rights of the City of Texarkana in the use of the public streets, alleys, squares, parks, bridges and all public places are hereby declared to be inalienable to any person, firm or corporation, except by license permit and franchise passed by the City Council on the affirmative vote of three-fifths of all the members of said council elected."

SECTION 161 (R. 164). "No franchise, lease or permit to the use of the streets, alleys, squares, parks, bridges or other public places or the use of either or any of them shall be made by the City Council for a longer term than twenty-five years."

SECTION 163 (R. 165). "*Said proposed franchise* shall contain all the terms and agreements between the parties thereto, and it *must expressly set*

*forth that the council shall have the right and privilege of regulating* and controlling the operation of all business done thereunder, *fixing fares, rates, tolls and charges* and inspecting the business and work from time to time as it progresses, and rate regulations shall conform to Section 197 of this charter."

SECTION 163a (R. 165). "In the event that any franchise or permit is so given by said council, which shall not contain such stipulations therein as provided for in Section 162 of this charter, then *it shall*, nevertheless, *be considered that all of the said stipulations contained in said Sections* 162, 163 *and* 197 *are part and parcel of the said contract and franchise, just as though written therein, and the said applicant so accepting such franchise, as well as their heirs, assigns and successors, shall be held and firmly bound thereto, notwithstanding such omissions.* As amended by 31st Leg., passed under emergency clause."

SECTION 196 (R. 166). "That the City Council shall have the power to regulate by ordinance the rates and compensation to be charged by all water, gas, light and telephone companies, corporations or persons using the streets and public grounds of said city and engaged in furnishing water, gas, light and telephone service to the public, and to prescribe rea-

sonable rules and regulations under which such commodities shall be furnished and services rendered, and to fix penalties to enforce such charges, rules and regulations; provided, that the City Council not prescribe any rtae or compensation which will yield less than ten per cent per annum net *on the actual costs of the physical properties, equipments* and betterments. Said City Council may also fix the charges which may be collected for transporting passengers and baggage in vehicles engaged in public service."

SECTION 37 (R. 164). "The ayes and nays shall be taken upon the final passage of all ordinances or resolutions, and entered upon the minutes of the council by the city secretary, and every ordinance or resolution shall require for its passage an affirmative vote of a majority of all the aldermen elected, except on ordinances or resolutions granting franchises or levying taxes, in either of which events it shall require for the passage of such ordinance or resolution an affirmative vote of three-fifths of all the members elected to the City Council."

## APPENDIX II.

### Statute as to Appeal to Railroad Commission from Actions of City Council in Regulating Gas Rates on Terms and Conditions to be Prescribed by the Commission.

Article 6058 of Revised Civil Statutes of Texas of 1925:

"When a city government has ordered any existing rate reduced, the gas utility affected by such order may appeal to the Commission *by filing with it on such terms and conditions as the Commission may direct, a petition and bond* to review the decision, regulation, ordinance, or order of the city, town or municipality. Upon such appeal being taken the Commission shall set a hearing and may make such order or decision in regard to the matter involved therein as it may deem just and reasonable. The Commission shall hear such appeal de novo. Whenever any local distributing company or concern, whose rates have been fixed by any municipal government, desires a change of any of its rates, rentals or charges, it shall make its application to the municipal government where such utility is located and such municipal government shall determine said application within sixty days after presentation unless the determination thereof may be longer de-

ferred by agreement. If the municipal government should reject such application or fail or refuse to act on it within said sixty days, *then the utility may appeal to the Commission as herein provided.* But said Commission shall determine the matters involved in any such appeal within sixty days after the filing by such utility of such appeal with said Commission or such further time as such utility shall in writing agree to, but the rates fixed by such municipal government shall remain in full force and effect until ordered changed by the Commission."

## APPENDIX III.

Article 6055 of the Revised Statutes of Texas is as follows:

"If any rate or charge for gas or for service or for meter rental or any other purpose pertaining to the operation of said business shall be made or promulgated by any person, firm or corporation owning or operating any gas pipe line, or in the event of an inadequate supply of gas or inadequate service in any respect, and complaint against same shall be filed by any person authorized by the preceding article to file such petition and such complaint is sustained in whole or in part, all persons and customers of said gas pipe line shall have the right to reparation or reimbursement of all excess in charges so paid over and above the proper rate or charge as finally determined by the Commission from and after the date of the filing of such complaint."